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No. 80, Original

IN THE

Supreme Court of the United States

October Term, 1977

STATE OF COLORADO, *Plaintiff*

v.

STATE OF NEW MEXICO
AND TONEY ANAYA,
ATTORNEY GENERAL OF THE STATE OF
NEW MEXICO, *Defendants*

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

AND

BRIEF AMICI CURIAE OF KAISER STEEL CORPORATION, PHELPS DODGE CORPORATION, VERMEJO PARK CORPORATION AND VERMEJO CONSERVANCY DISTRICT IN SUPPORT OF THE POSITION OF THE STATE OF NEW MEXICO

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April 6, 1982

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Come now Kaiser Steel Corporation, Phelps Dodge Corporation, Vermejo Park Corporation and Vermejo Conservancy District, and respectfully move the Court for leave to file the attached Brief as Amici Curiae in support of the position of the State of New Mexico, and state:

1. This motion is filed pursuant to Rule 36.3 of the Revised Rules of the Supreme Court of the United States.

2. These movants have requested that the parties consent to the filing of an amici curiae brief. New Mexico has consented, but Colorado has refused to consent.

3. The movants are the principal appropriators of the waters of the Vermejo River, having water rights adjudicated by the New Mexico court with priority dates ranging from 1867 to 1910. Movants apply the water to irrigation, industrial, domestic and recreational uses. There are not now and have never been any uses of the water in Colorado. Movants will suffer severe and irreparable injury if the

Report of Special Master on the Equitable Apportionment of the Vermejo River should be adopted by this Court.

4. Before these original proceedings were instituted, the movants, as private litigators, obtained a decree in the United States District Court for the District of New Mexico in Cause No. 76-244-P enjoining a prospective Colorado user, CF&I Steel Corporation, from diverting the waters of the Vermejo River and its tributaries, Ricardo Creek, Little Vermejo Creek and Fish Creek, out of its priority. Said cause has been appealed to the United States Court of Appeals for the Tenth Circuit where the appeal is still pending.

5. If this Court adopts the Special Master's report apportioning waters of the Vermejo River to Colorado out of the established priority, the implicit but direct effect will be to overrule nearly 80 years of precedents from this Court, from the lower federal court system, and from the state courts as to the applicable law of interstate stream disputes between appropriators in appropriation doctrine states.

6. In view of the importance of this cause to the movants, whose property rights would be destroyed by the adoption of the Special Master's recommendations, movants should be permitted to put their position before the Court by the proposed Brief which accompanies this Motion.

Respectfully submitted,

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I. INTRODUCTION AND STATEMENT OF INTEREST OF THE *AMICI CURIAE*

A. *Amici Curiae.*

The *amici curiae* are the principal New Mexico users of the water of the Vermejo River, owning water rights adjudicated in a general stream adjudication in New Mexico in 1941. The Vermejo is a puny river, an insignificant creek by eastern or midwestern standards. But it is the lifeblood of Colfax County, New Mexico. The respective individual interests of the *amici curiae* are summarized as follows:

1. Phelps Dodge Corporation

Phelps Dodge Corporation owns irrigated land situated immediately below the Dawson Gauge. Its right to irrigate 501.19 acres (the equivalent of 1,002.38 acre-feet) is the oldest on the river, having a priority date of 1867. A total of 200 acres of these rights have been leased and administratively transferred to Kaiser Steel Corporation at its York Canyon mine. The remaining irrigated land is currently farmed by C S Cattle Company, whose lease obligates it to divert the necessary water for the irrigation and growing of crops and to do all things necessary to preserve Phelps Dodge's irrigation right. The lease reserves to Phelps Dodge the right to withdraw water from irrigation uses for industrial application.

Phelps Dodge diverts directly from the river. It has no storage facilities or storage right, and its ability to use water is necessarily limited by the quantity available in the stream from time to time during the irrigation season. In the arid climate of New Mexico, whose weather patterns vary markedly from year to year, successful irrigation depends upon the constant availability of water during the spring and early summer — months which are commonly low in rainfall and when mountain snow melt supplies the dependable base flow of the stream. On occasion, the Phelps Dodge right has called upon Vermejo Park Corporation to reduce its upstream diversion so as to permit water to reach the Phelps Dodge headgate.

2. Kaiser Steel Corporation

Kaiser Steel Corporation operates a substantial coal mine at York Canyon, a small Vermejo tributary located roughly halfway between the state line and the Dawson Gauge. Kaiser diverts primarily from a sump in the bed of

the Vermejo River for its coal mining activities, including dust suppression, coal washing, irrigation of reseeded areas, and some domestic purposes. In addition to the 400 acre-feet leased from Phelps Dodge, Kaiser Steel owns 230 acre-feet with priority dates of 1877, 1883 and 1887. These rights are in most respects senior to all other users except Phelps Dodge. Kaiser has no storage right and is completely dependent upon the daily availability of water in the Vermejo River. On various occasions it has made demand upon Vermejo Park Corporation to cease or reduce its irrigation diversions from the river. Kaiser Steel must rely upon the dependable flow of the river, and when that flow is unavailable, Kaiser Steel will have to shut down its plant. The cost of bringing water to York Canyon from the Cimarron River, the only other source conceivably available, is estimated at twelve million dollars.

3. Vermejo Park Corporation

Vermejo Park Corporation operates a cattle ranch on which it conducts farming operations and recreational activities between the state line and the Phelps Dodge property. Its decreed rights authorize it to irrigate 70.2 acres by direct diversion from the main stem of the Vermejo River with priority dates of 1873, 1876 and 1878. Vermejo Park has no storage rights on the main stem. Between 1963 and 1970 the ranch actively irrigated about 700 acres along the river. Subsequent to 1970 the supply of water in the river diminished appreciably, and priority calls were received from Phelps Dodge and Kaiser Steel, as a result of which the acreage actively irrigated has been temporarily reduced to approximately 250 acres. Recent efforts to replant and to restore some of the old fields to production have proved fruitless because of inadequate irrigation water to develop and maintain mature root systems.

4. Vermejo Conservancy District

The Vermejo Conservancy District is an entity organized under New Mexico law which represents more than seventy owners of irrigated lands in the District, among whom is included the United States' Maxwell Wildlife Refuge. The District has the right to divert and store water from the Vermejo River with priority dates of 1888, 1891, 1908 and 1910 and to irrigate lands served by its system. The decree permits the irrigation of 14,621.55 acres, all of which were under irrigation in 1941, but the District's repayment contract with the Bureau of Reclamation, made in connection with the rehabilitation and reconstruction of its diversion and storage facilities, specifies that water be applied to 7,380 acres, except in the event of excess water becoming available to the District. The District receives part of its water from the Chico Rico Creek, but all of its lands can receive water from the Vermejo diversion, and approximately 70% of its water supply is obtained from the Vermejo diversion dam and canal.

Although the water supply studies made by the Bureau of Reclamation and the Bureau's analysis of the repayment capacity of the Project showed that the rehabilitation project was feasible and that the water supply was adequate to insure repayment to the government of a specified portion of the cost, the District has experienced chronic shortages in all but two years since the completion of the rehabilitation project in 1955. The crops grown on the lands of the District have been sufficient to permit the payment of all operation and maintenance expenses, but the District has been unable to meet all of its scheduled repayment to the United States. Congress has acted to defer the repayment obligation, but not to cancel or discharge it.

B. Private Litigation.

The *amici curiae*, learning of CF&I Steel Corporation's plan to divert from the watershed up to 75 cubic feet per second of the dependable snow melt furnishing the base flows of the Vermejo River, commenced an action in the United States District Court for the District of New Mexico, seeking to enjoin CF&I from diverting out of priority to the detriment of the plaintiff water users. Both Colorado and New Mexico follow the doctrine of prior appropriation. There is not now and never has been a use of the Vermejo water in Colorado. The District Court granted summary judgment to the plaintiffs, applying the federal common-law doctrine of priority of appropriation. Its decree enjoined CF&I from making any diversions out of its priority. That judgment is presently on appeal to the Court of Appeals for the Tenth Circuit. When this action for equitable apportionment was thereafter filed by Colorado, the consideration of the appeal was stayed at the request of CF&I pending determination of Colorado's suit.

C. Detriment to Amici Curiae

The Special Master's report recommends that Colorado be permitted to divert 4,000 acre-feet annually (which is most of the dependable flow) from the headwaters of the Vermejo River, all of which is to be transported to the Purgatoire drainage where it is to be permanently lost to the Vermejo system. There is no limitation as to the time when the water may be taken, or as to the rate of taking. Obviously, this has the practical effect of awarding to CF&I the first priority on the river and is very detrimental to the senior New Mexico users whose century-old appropriations are thus arbitrarily subordinated to the demands of a not-yet-existing use in Colorado. The effects upon the

individual *amici* will not be uniform; however, it is evident that in periods of drought and low flows — and, indeed, in most periods — the already critical problems facing direct flow appropriators will be grossly exacerbated. And the effect upon the District will be utterly disastrous.

II. SUMMARY OF ARGUMENT

The Special Master misunderstood the evidence placed before him. He equated "average" flow in the river with dependable, predictable flow. He simply misread the evidence with respect to water available to, and the economic viability of, the small farming operations comprising the Vermejo Conservancy District. He totally misconceived the effect of his recommendations on these and the other totally dependent New Mexico users, who are presently and historically the only users on the river.

The Special Master misunderstood the doctrine of equitable apportionment. He believed that the doctrine required him to apportion water to Colorado despite there having been no use ever made of the water there, and he ignored decades of precedent to the contrary from this Court and other federal and state courts.

Where, as in this case, an original proceeding is pending with respect to an interstate stream between two states each following the doctrine of prior appropriation, where the stream has been for decades over appropriated in the one state with no present or historic use whatever in the other, the rule of equitable apportionment is the rule of prior appropriation. New uses will be permitted but only in their respective priorities of appropriation from the stream. Even were this Court to overrule decades of precedent and require considerations of "equities" in favor of

a non-existent use, none of the equities to which this Court has ever alluded in equitable apportionment cases exist here.

The result of the Special Master's misconceptions would be complete disaster to long existing, totally dependent economies in New Mexico.

III. ARGUMENT

A. The Special Master Misunderstood the Physical Evidence in the Case. The Consequence of the Error Is a Recommendation Which Is Grossly Inequitable

One must start any discussion of the impact of the Special Master's decision with the fate of the Vermejo Conservancy District, because even the Special Master concedes that Colorado's diversions will affect the District, a fact which he refuses to acknowledge, or simply does not perceive, with respect to the other New Mexico users. The Special Master justifies obliteration of the District by pointing out (a) the shortcomings of the Bureau of Reclamation Project in the 1950's and (b) the District's inability "to meet its debts and live up to its expectations . . ." (Report at p. 10). This latter statement overlooks one of the most important facts in this case. As the single largest user of Vermejo River water in New Mexico, the District has suffered chronic and severe water shortages since the completion of the rehabilitation of the District's works in 1955. New Mexico's evidence, specifically Exhibits F-22 and F-37, showed that over the period of 1955-1979 the shortage to demand averaged 56% (Tr. 1309-1311). This same evidence further showed that an award to Colorado of 3,650 acre-feet per annum would *alone* constitute a third of the already short historic supply available to the District over

the 1955-1979 period, a taking which New Mexico's expert witness testified would be "disastrous" to the District (Tr. 1326).

Secondly, the Bureau of Reclamation Project was not the beginning of farming in the Maxwell area as the Special Master somehow supposes. Farming by irrigation near the community of Maxwell has been a fact of life in Colfax County since 1888. For the Special Master to declare that the District has never been an economically feasible operation because the District is presently unable to meet a repayment obligation on a recent reclamation project totally ignores a long history of agricultural activity in the District well before the Bureau of Reclamation Project. Furthermore, the Special Master judges the feasibility of a reclamation *project* through the perspective of 20-20 hindsight, instead of addressing the almost one hundred years of the use of the *water*.

The evidence in this record shows that neither the Congress nor the agency in charge of reclamation projects, the Bureau of Reclamation of the Department of the Interior, authorized or recommended the rehabilitation of the District's works without a detailed and comprehensive evaluation of the Project's probable success in terms of its ability to repay the United States Government. The Bureau's Chief Executive Officer for the Southwest Region emphasized in his testimony before the Special Master that (a) the Bureau's studies in the late 1940's and 1950's indicated the existence of an adequate water supply for the Project from both the Vermejo and the Chico Rico Creek; (b) the Project users would have the ability to repay the Government over the usual 75 year period of time; and (c) the Project was deemed feasible by both Congress and the Bureau at the time it was authorized (e.g. Tr. 1508-

1513). No one foresaw at the time the drought cycles of the 1950's and 1960's and particularly the 1970's which struck this region of New Mexico as well as many others (including the Purgatoire in Colorado) resulting in a sharply diminished water supply for the Project. For the Special Master to state now some 30 years after the Project was authorized that "[i]t should have never been built . . ." reflects an insensitivity to the efforts of the area's farmers to live with a chronic shortage of water and of those government officials who have attempted to overcome the District's problems.

Contrary to the Special Master's statements, Congress has never concluded that the Project will be unable to meet its debts. Public Law 96-550 (1980) authorized the Secretary of Interior to *defer* repayment until the Secretary determined that further repayment was feasible, at which time the District and the United States would renegotiate the existing repayment contract. Furthermore, the District has always met its operation and maintenance costs since 1955 and in fact has made several repayments to the Government for the capital costs of the Project (Tr. 1519-1520; 1525). No payments have been made since 1975 because of drastic water supply shortages. The representatives of the people have not written off the Vermejo Project — only the Special Master has.

Based upon his erroneous view of the history of the District and the failure of the Bureau of Reclamation Project to live up to expectations, the Special Master, astonishingly and with great illogic, concludes that therefore the water should be taken from the farmers in the District for an entirely new use outside the river system (Report at pp. 7, 23).

The impact of the Special Master's decision is no less severe in absolute economic terms with respect to the direct flow appropriators on the Vermejo in New Mexico. The Special Master's discussions of the Kaiser Steel rights most vividly illustrate his lack of comprehension of the potential impact by the award to Colorado upon direct flow appropriations in New Mexico. The Special Master's analysis of the Kaiser Steel right proceeds upon the assumption that flow measurements at the Dawson Gauge indicate that more than enough water is available to satisfy Kaiser Steel's rights, which include some of the senior rights of the Phelps Dodge Corporation, and that in any event Kaiser Steel has never diverted its full decreed appropriation (Report at p. 5). Assuming *arguendo* the validity of the Special Master's premises, his analysis looks at only one side of the water supply coin and fails to take into account (1) that industrial water is necessarily acquired years in advance in order to develop coal reserves with reasonably limited risk, (2) that a constant, dependable daily supply of water is imperative for operations [not an averaged yearly statistic], and (3) that the impact of *new depletions* in Colorado will on substantial occasions deprive Kaiser Steel of water at its authorized points of diversion. Kaiser Steel cannot operate with an undependable water supply. New Mexico's evidence, particularly Exhibit F-21 (Rev.), demonstrated that if Colorado depleted the Vermejo River in Colorado by 300 acre-feet a month (or 5 cfs a day) during the historically low flow months of April, June and September, there would be shortages to Kaiser Steel as well as Vermejo Park Corporation and other users below the Dawson Gauge. More dramatically, New Mexico Exhibit No. F-30 illustrates that if in May of the year 1977 Colorado had been entitled to take 67% of the flow of the water of the Vermejo River at the state line the flow in the

River at Dawson Gauge would have been *zero*. Similar results would have been expected for September and October of 1977 assuming Colorado depletions of 85% and 56% respectively of the flow at the state line. In all of these months there would have been severe shortage to Kaiser Steel's industrial demands (Tr. 1260-1262). And the testimony of the experts aside, the testimony of the lay witnesses who have lived day in and day out with the flows of the river was that there are chronic, substantial shortages, confirming the jeopardy to the area's economy from any award of base flow to Colorado. What is essentially illustrated by this evidence is that there are no excess flows in the Vermejo River which Colorado should be allowed to divert at or above the state line.[1]

The rights of two other direct flow appropriators on the Vermejo, the Phelps Dodge Corporation and the Vermejo Park Corporation, are given equally short shrift. The Report points out that only a small part of the decreed acreage owned by each company is actually irrigated at this time (Report at pp. 5-7). The Special Master believes that the Phelps Dodge and Vermejo Park Corporation water rights are measured only by their current use, not by their decreed amounts and uses in periods of adequate, dependable and predictable flow — a gross error. No recognition is given by the Special Master as to the reasons for the declining amount of irrigation on either the Vermejo Park or Phelps Dodge properties, i.e. chronic shortages of water — a second gross error — much less to the impacts

[1] Any doubt on this score is removed by the fact that Kaiser Steel itself was required in 1965 to purchase and retire rights on the Vermejo River in order to secure a water right for its York Canyon Mine. *W. S. Ranch Company v. Kaiser Steel Corporation*, 79 N.M. 65, 439 P.2d 714 (1968).

of new depletions in Colorado on the prospects of the two appropriators to increase their respective uses as water is dependably available — a third gross error. Apart from all that, the Special Master obviously believes, based upon Colorado's "averaging" of the flows in the river, that the flow is constant and uniform throughout the year — a fourth gross error, and the least understandable, because the common experience of all snow-melt-dependent streams is to the contrary.[2]

Other New Mexico users, the direct flow appropriators from the Vermejo canal, are not even mentioned in the Special Master's Report.

As indicated above, one principal difficulty with the Special Master's assessment of the impact of his decision on the Vermejo River users is his failure to distinguish between average flows and divertable flows at the Dawson Gauge in New Mexico. Colorado employed average flows, swollen by contribution from flood flows, to arrive at its estimate of water available to New Mexico users at the Dawson Gauge. New Mexico's evidence, on the other hand, discounted flood flows (unusable by the direct flow appropriators on the Vermejo) and thereby arrived at more dependable numbers expressed as the historic amount of water actually available to each New Mexico appropriator over

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[2] The inconsistency inherent in the Special Master's report is demonstrated by a comparison of two mutually contradictory sentences. On the one hand he states: "If the rule of priority were to be strictly applied . . . a diversion of water by Colorado would not occur." (Report at p. 21). On the other hand, "It is the opinion of the Master that a transmountain diversion would not materially affect the appropriations granted by New Mexico for users downstream." (Report at p. 23). If this last statement were true, a junior Colorado appropriator, diverting in priority, could certainly expect to receive water in usable quantities.

the period of record. The fact that the Special Master does not perceive the difference in statistical approach by the two states (Report at p. 2) further demonstrates his total miscomprehension of the record in this case. This Court has consistently stated that the use of average flows is not a realistic method for predicting the amount of water actually available to each state for uses in those states (e.g. *Nebraska v. Wyoming*, 325 U.S. 589, at p. 620 [1945]).

B. The Special Master Misunderstood the Doctrine of Equitable Apportionment. The Consequence of the Error Is a Recommendation Which Is Unsupported by Precedent and Is Grossly Inequitable.

The Special Master held a fundamental misunderstanding of the doctrine of equitable apportionment. He viewed the doctrine as absolutely entitling each state to a share of any stream flowing between them.[3] With this misconception, the Special Master proceeded to a consideration of the evidence in the belief that he had to apportion some water to Colorado, for new appropriations, from a stream which is unable to satisfy existing appropriations in New Mexico.

The Court has never announced such a rule. The upper state does not have a sovereign right to divert and use water regardless of injury to lower state users.[4]

The seminal fact in this case, significant in terms of this Court's precedents but obscured by the Special Master's discussion of what he perceives to be the "guiding

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[3] Report at p. 8.

[4] *Kansas v. Colorado*, 206 U.S. 46 (1907); *Wyoming v. Colorado*, 259 U.S. 419 (1922).

principle of equitable apportionment," is that both Colorado and New Mexico are prior appropriation states.

It is unfortunate that the Special Master started out on the wrong foot, for the misstep caused him to misunderstand *Nebraska v. Wyoming*, 325 U.S. 589 (1945). In an earlier apportionment case involving two states, each of which followed the prior appropriation doctrine, this Court had applied priority as a just and equitable method to resolve the controversy.[5] *Nebraska v. Wyoming* also involved states observing the prior appropriation doctrine. There, even though there were (unlike our case) existing uses to be protected in both states, this Court affirmed the proposition that "(p)riority of appropriation is the guiding principle," although all the factors which create equities one way or the other should also be considered in resolving an apportionment controversy.

The Special Master misperceived the "guiding principle" pronouncement. For example, the Special Master stated that *Hinderlider v. La Plata Co.*, 304 U.S. 92 (1938), "reaffirms the Court's position that the doctrine of *equitable apportionment* is still the *guiding principle* . . ."[6] (Report at p. 18, *emphasis added*) "Equitable apportionment remains the guiding doctrine . . ." (Report at p. 22). The Special Master thought that if he applied the priority doctrine followed by both Colorado and New Mexico, one of the factors to be used in making an equitable apportionment (established priorities) would "destroy the guiding principle itself." (Report at p. 17). Believing the guid-

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[5] *Wyoming v. Colorado*, 259 U.S. 419 (1922).

[6] As a matter of interest, *Hinderlider* was not even an apportionment case, but was a compact case.

ing principle to be equitable apportionment, not priority of appropriation, caused the Special Master to shunt aside priority from any consideration in this case.

The Special Master compounded his error by his notion that this Court has held that "factors other than priority must be applied to achieve equity" in cases involving interstate streams (Report at p. 21). The Court has not so held, but has held that all factors which *create* equities must be *weighed*, not "applied to achieve equity."[7]

What has happened, then, is the Special Master has considered the evidence, and has made his recommendation to the Court, pursuant to an understanding as to the applicable law which is contrary to this Court's pronouncements over many years. By proceeding into this case with the belief that he was required to award water to Colorado, that he was required to apply equitable apportionment as the guiding principle, and that he was required to apply factors other than priority to obtain an equitable apportionment, the Special Master has completely ignored the one factor (priority) which *Wyoming v. Colorado* stated was "eminently just and equitable" and which *Nebraska v. Wyoming* stated was the "guiding principle" in seeking a just and equitable resolution of the controversy.

Both Colorado and New Mexico observe the doctrine of prior appropriation. In suits between appropriation states, the Court has held that application of priority would be the equitable apportionment:

> We conclude that Colorado's objections to the doctrine of appropriation as a basis of decision are not well taken, and that it furnishes the only

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[7] *Colorado v. Kansas*, 320 U.S. 383 (1943).

> basis which is consonant with the principles of right and equity applicable to such a controversy as this is. The cardinal rule of the doctrine is that priority of appropriation gives superiority of right. Each of these states applies and enforces this rule in her own territory, and it is the one to which intending appropriators naturally would turn for guidance. The principle on which it proceeds is not less applicable to interstate streams and controversies than to others. Both states pronounce the rule just and reasonable as applied to the natural conditions in that region; and to prevent any departure from it, the people of both incorporated it into their constitutions. It originated in the customs and usages of the people before either state came into existence, and the courts of both hold that their constitutional provisions are to be taken as recognizing the prior usage rather than as creating a new rule. These considerations persuade us that its application to such a controversy as is here presented cannot be other than eminently just and equitable to all concerned. *Wyoming v. Colorado*, 259 U.S. 419, 470 (1922).

Wyoming v. Colorado therefore stands for the proposition that water rights developed on an interstate stream under the law of prior appropriation normally should be protected by the doctrine being applied interstate. The proposition is not inflexible if its application will result in an unjust and inequitable resolution of the controversy. Application of the doctrine was varied in *Nebraska v. Wyoming* and *Arizona v. California*, 373 U.S. 546 (1963), in order to protect established economies which were based on junior priority uses. As the Court stated in *Nebraska v. Wyoming*:

> So far as possible those established uses should be protected though strict application of the priority rule might jeopardize them. Apportionment

> calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former — these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made. *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945).

The law as to water rights disputes among private litigators on interstate streams between appropriation doctrine states is clear: the water rights first in time have a priority of use (as of their date of inception) over later appropriators; and the accidental intervention of a state line between the users is not significant. Although *Wyoming v. Colorado*[8] is essentially an equitable apportionment case, it also states succinctly the reasons and principles of this interstate priority doctrine, a doctrine that can be almost prophetically applied to the present case.[9]

> In suits between appropriators from the same stream, but in different states recognizing the doctrine of appropriation, the question whether rights

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[8] Where Colorado, being the upper-river state, made astonishingly similar arguments as in the instant case.

[9] New Mexico's appropriation doctrine water law is similar to, and adopted in large part from, Wyoming and Colorado's early laws. Hence, New Mexico can be substituted for Wyoming in the reading.

> under such appropriations should be judged by the rule of priority has been considered by several courts, state and Federal, and has been uniformly answered in the affirmative .... 259 U.S. at 470.

By express reference, the law applicable to interstate water rights disputes between private litigants was affirmed and held to be the same as in so-called equitable apportionment. *Wyoming v. Colorado*, 259 U.S. at 470, 471. That is the same law or principle of law followed in *Kaiser Steel Corporation, et al., v. CF&I Steel Corporation*, Civil No. 76-244-P (D.N.M. 1978), and as is universally applied in such interstate stream disputes. *Conant v. Deep Creek and C. Valley Irrig. Co.*, 23 Utah 627, 66 Pac. 188 (1901); *Willey v. Decker*, 11 Wyo. 496, 73 Pac. 210 (Wyo. 1903); *Taylor v. Hulett*, 15 Idaho 265, 97 Pac. 37 (1908); *Howell v. Johnson*, 89 Fed. 556 (10th Cir. Mont. 1898); *Hoge v. Eaton*, 135 Fed. 411 (D. Colo. 1905); *Morris v. Bean*, 146 Fed. 423 (D. Mont. 1906); *Bean v. Morris*, 159 Fed. 651 (9th Cir. Mont. 1908); *Lindsey v. McClure*, 136 F.2d 65 (10th Cir. N.M. 1943); *Albion-Idaho Land Company v. NAF Irrigation Co.*, 97 F.2d 439 (10th Cir. 1938); *U.S. v. Walker River Irrigation District*, 11 F. Supp. 158 (D. Nev. 1935); *Finney County Water Users' Association v. Graham Ditch Company*, 1 F.2d 650 (D. Colo. 1924).

And this Court has also expressly approved that principle. *Bean v. Morris*, 221 U.S. 485 (1911); *Weiland v. Pioneer Irrigation Co.*, 259 U.S. 498 (1922); *Rickey Land & Cattle Co. v. Miller & Lux*, 218 U.S. 258 (1910); *Arizona v. California*, 373 U.S. 546 (1963).

Thus, from these cases it is clear that, as to water disputes between appropriation doctrine states, priority of use is priority of right, and there is nothing in the law of equitable apportionment which is contrary.

From the foregoing, the critical concept is simply stated: In private litigation among appropriators from interstate streams between two prior appropriation doctrine states, the junior appropriators must give way until the senior appropriators' rights are filled; in original proceedings with respect to interstate streams between two prior appropriation doctrine states in one of which there has never been a use of the water, the rule of priority shall be the basis of the equitable apportionment. It follows that the result here should be exactly the same as in the private litigation in the federal court below — any Colorado users should be entitled to take water, but only in accordance with their priorities of appropriation from the river.

The foregoing principle is completely dispositive of this action. But assuming *arguendo* that the Court should, contrary to decades of established law, look to factors other than priority even where no use has ever been made of the water in one state, there are in this case no equities in favor of Colorado warranting destruction of the dependent New Mexico economies. The briefest allusion to the other factors catalogued in *Nebraska v. Wyoming* so demonstrates:

• (*"physical and climatic conditions"*) The Colorado portion of the Vermejo headwaters drainage consists of about 30 square miles, is above 8,500 feet, and is essentially uninhabited and inaccessible. These physical conditions precluded use of water in the Colorado portion and caused early appropriators to divert and use the Vermejo waters farther downstream in a region which at the time had not been admitted to the Union as a State.

• (*"consumptive use . . . and . . . return flows"*) Consumptive use and return flows do not occur in the Colorado portion because of the absence of any diversion for irriga-

tion (or other) use. Return flows do occur in New Mexico and are relied upon by downstream appropriators.

• (*"extent of established uses"*) Even today, the extent of established uses is zero in Colorado, but for nearly 100 years 100% of the river flow has been consumed in New Mexico.

• (*"availability of storage water"*) There are no storage water facilities in Colorado. Only the Vermejo Conservancy District in New Mexico has storage facilities.

• (*"effect of wasteful uses on downstream areas"*) There are no wasteful uses in Colorado affecting downstream areas because there are no Colorado uses.

•(*"damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former"*) No damage to the upstream Colorado area would occur by imposing a limitation of its use, because there is no use. The employment which the Special Master noted is supplied by CF&I Steel Corporation does not and never has depended upon Vermejo River water, because there has never been a use of that water by CF&I or any other Colorado user.

The Special Master recognized that Colorado has never diverted and benefically used any water, but that New Mexico has done so "and has existing economies which are dependent upon that water." (Report at p. 21).

A consideration of the *Nebraska v. Wyoming* factors thus does not disclose the existence of any equity in favor of Colorado which must be weighed. But since that list of factors is not exhaustive, what other factors were considered by the Special Master to create equities in favor of Colorado?

Three factors are mentioned: (1) CF&I Steel Corporation is a major employer in southern Colorado and northern New Mexico;[10] (2) CF&I's proposed use would have economic repercussions throughout the economy of the area;[11] and (3) the water in question originates in Colorado.[12] We have no quarrel with the proposition inherent in factors (1) and (2) that the proposed future appropriation may or can be beneficial. But these factors create no equity in Colorado requiring damage to downstream users.[13] The third factor does not create equity. It is simply the physical condition inherent in all interstate controversies involving interstate streams.

Thus, even these various additional factors do not create any equity in favor of Colorado to support the apportionment of any water to Colorado.[14]

Although he did not mention it specifically, it may be assumed that the Special Master accepted Colorado's evidence of severe shortages of water in the Purgatoire River,

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[10] Report at p. 17. As noted above, the employment has never depended upon any use of Vermejo River water.

[11] Report at p. 17.

[12] Report at p. 23.

[13] "It would be unreasonable in the extreme to reserve water for future use in New Mexico when senior downstream appropriators in Arizona remain unsatisfied. It was so held as to Colorado's claim in *Nebraska v. Wyoming*, 325 U.S. 589 (1945)." Special Master Report, *Arizona v. California*, Dec. 5, 1960, p. 331.

[14] In the Report at pages 22-23 the Special Master curiously concluded that Colorado "in a sense" has a junior appropriation in the form of an inchoate water right. On this predicate, Colorado could be apportioned water since "senior water rights may be subrogated to junior water rights so that equity may prevail." The trouble with this analysis is that Colorado has never used the water to establish any economy for which out-of-priority protection should be afforded.

of its over appropriated condition, and of "the inability to satisfy anything but the most senior rights" (Colorado's post hearing brief, p. 8). These detrimental conditions are matched by shortages on the similarly over appropriated Vermejo; and the detriment shared by both states does not raise an "equity" in Colorado's favor. The true significance of the shortages is to emphasize the *inequity* of Colorado's attempt to characterize as "historic usage" the meager supplies divertable from the River during this period of shortage. In neither state is a junior appropriator deprived of his right merely because all available water is consumed by those with senior rights. Yet the definition of "historical usage" without reference to the rights adjudicated and to the availability of water to satisfy them is devoid of any semblance of equity and fairness.

Colorado's claim of an "equitable share" of water rests, in the last analysis, upon its territorial sovereignty or "lordship" over 30 square miles of mountain real estate which are remote and virtually untouched. Its "equity" lies in its ownership — an accident of geography directly resulting from the relocation of territorial boundaries. For the Vermejo is historically New Mexican. All of it was subject to the sovereignty of Spain and Mexico; and it was part of the Territory of New Mexico until 1861, when Colorado was carved out as a territory from portions of the Territories of Utah, New Mexico, Kansas and Nebraska.

The relocation of the territorial boundary at the 37th rather than the 38th parallel made good sense geographically in 1861, as the summit of Raton Pass separated the drainage of the Purgatoire, flowing Northeast to the Arkansas River, from that of the Canadian River to the South. But a line of latitude superimposed on the topographical features of the landscape is inherently arbitrary.

And this obscure pocket of Vermejo drainage has been overlooked or ignored for a full century. New Mexico has adjudicated the Vermejo as a New Mexico river without consciousness of intruding into Colorado's domain; and Colorado has similarly defined the statutory jurisdiction of its water courts without any awareness of its Canadian River drainage.[15]

Without question, this obscure domain belongs to Colorado and is subject to its sovereignty. But as an equitable factor to justify the suppression of legitimately established New Mexico uses, this naked sovereignty is a weak reed, long since rejected as a basis of apportionment.[16]

IV. CONCLUSION

Regrettably, the Special Master misunderstood the physical evidence in this case, even misunderstanding that appropriators must rely on the base flow (dependable flow) of a stream. The Special Master also misunderstood the doctrine of equitable apportionment, which, on the facts of this case, is precisely the same as the common-law doctrine of prior appropriation with respect to private litigation on interstate streams. And even were the Court, contrary to long established precedent, to look to other "equities," there are no equities for Colorado warranting destruction of the long established, wholly dependent New Mexico economies. To adopt the Special Master's recom-

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[15] §37-92-201(1)(b) CRS, 1973, defines the jurisdiction of the Water Court, Division 2, as follows: "Division 2 consists of all lands in the state of Colorado in the drainage basins of the Arkansas River and the Dry Cimarron River, and streams tributary to said rivers." The Vermejo is tributary to the Arkansas only in the sense that the Canadian joins the Arkansas at a point southeast of Tulsa, Oklahoma.

[16] *Kansas v. Colorado*, 206 U.S. 46 (1907).

mendations would be a total departure from this Court's established precedents and would cause a grossly inequitable result.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Burton M. Apker, hereby certify, pursuant to Rules 33.3 and 33.5 of the Rules of the Supreme Court of the United States, that I am a member of the bar of this Court and am counsel of record for the Amici Curiae named in the foregoing Motion for Leave to File Brief As Amici Curiae and Brief Amici Curiae of Kaiser Steel Corporation, Phelps Dodge Corporation, Vermejo Park Corporation and Vermejo Conservancy District in Support of the Position of the State of New Mexico, and that on the 6th day of April, 1982, I caused to be served the requisite number of copies of the foregoing Motion and Brief, by first class mail, with postage prepaid, addressed to counsel of record for the States of Colorado and New Mexico, respectively, as follows:

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